HARRY D. OWEN

IBLA 73-137 Decided September 5, 1973

Appeal from the decision (ES 1261 Mississippi) of the Eastern States Land Office, Bureau of Land Management, Department of the Interior, demanding payment of delinquent royalty in the amount of $4,304.90.

Affirmed.

Oil and Gas Leases: Communitization Agreements ! ! Oil and Gas Leases: Royalties

The Secretary of the Interior has authority to approve communitization or drilling agreements. However, such approval is not effected for any purpose, including computation of royalty purposes, until the Secretary or his designate signs the agreement.

Oil and Gas Leases: Generally ! ! Oil and Gas Leases: Communitization Agreement

State or Geological Survey permission to drill a well in accordance with a state well spacing regulation permitting only one well per 320 acres is not a substitute for Secretarial approval of a unit agreement and does not create a unit agreement under the Mineral Leasing Act.

Oil and Gas Leases: Communitization Agreement ! ! Oil and Gas Leases: Generally

Where the state well spacing regulation permits only one well per 320 acres, the fact that a federal lessee, whose lease covers only 40 acres, drills a well on his lease, with the consent of the other adjoining lessees or land owners, does not create a unit agreement in the absence of approval by the Secretary.

APPEARANCES: Charles Ed Harper, Esq., Peterson, Harper and Mallette, Jackson, Mississippi, for the appellant.

OPINION BY MR. RITVO

Harry D. Owen has appealed from a decision of the Eastern States Office, Bureau of Land Management, dated September 1, 1972, which held that a delinquent balance of $4,304.90 unpaid royalty from production on lease ES 1261 was due and payable. Owen contends that only $2,459.95 is due because ES 1261 was part of a unit and is chargeable only with its proportionate share of production.

The facts indicate that effective July 1, 1966, Owen was issued competitive oil and gas lease ES 1261 covering a tract of land situated in Pistol Ridge ! Maxie Field, Mississippi, containing 40.16 acres, of which the United States owned an undivided 50% interest, for a five ! year term and so long thereafter as oil or gas is produced in paying quantities. Rentals were timely paid maintaining the term of the lease to July 1, 1971. The lease was then continued by production on the leasehold until July 8, 1971, when production ceased.

Lease ES 1786 effective October 1, 1966, was issued to Owen, covering an adjoining tract of land containing 79.95 acres. The lease issued for a five ! year term and so long thereafter as oil and gas is produced in paying quantities. Rentals were timely paid in 1967, 1968 and 1969, thereby maintaining the term of the lease to October 1, 1970.

On July 20, 1970, Owens designated Larco Drilling and Exploration Company, of which he was President, as operator of ES 1261. On September 2 and 3, Larco received permission from the Geological Survey and the Mississippi Oil and Gas Board to drill a well within the limits of ES 1261. The applications described the lease as the Maxie Gas Unit SW 52, Well No. 2, with the well located on U.S. lease ES 1261, SE 1/4 SE 1/4, sec. 11, T. 1 S., R. 13 W. The application filed with the Geological Survey stated that the lease contained 40.16 acres and that 320 acres were assigned to the well. The state application also noted that there were 320 acres in the drilling unit. Work was commenced immediately on the well and it was completed as a producing gas well on September 11, 1970.

Owen, Larco, and other owners and lessees of adjoining land, entered into a communitization agreement covering 320 acres in S 1/2 S 1/2 sec. 11 and N 1/2 N 1/2 sec. 14, T. 1 S., R. 13 W., St. Stephens Meridian, Mississippi, which included leases ES 1261 and 1786. The agreement stated it was entered into on September 1, 1970. However, it was filed with the Tulsa, Oklahoma, Office of the United States Geological Survey on October 23, 1970. By

letter of October 28, 1970, the Tulsa Office notified Appellant that the agreement required revisions in one or two particulars. These revisions were made and the application resubmitted for approval of the communitization agreement.

On November 24, 1970, the Tulsa Office of the Geological Survey advised appellant that the communitization agreement could not be approved for the reason that lease ES 1786 had expired due to nonpayment of the rental due on or before October 1, 1970, and, as a result, that lease would have to be offered for competitive leasing and leased before the agreement could be approved. Owen, Larco and the other signatories to the communitization agreement had also entered into a "Pooling Declaration and Designation of Unit" stated to be effective as of September 15, 1970, but which was not signed by all the participants until early October 1970. It was filed for record in Forrest County, Mississippi on October 21, 1970.

As we have seen, lease ES 1261 was extended beyond its primary term by production, but expired on July 8, 1971, when production ceased. The Geological Survey computed the royalties due on it to be $4,304.90 and billed Owen for that amount several times. When payment was not forthcoming, the Geological Survey referred the matter to the Eastern States Office for collection. In a letter dated August 24, 1972, to the Eastern States Office, Owen said the lease was the property of Larco and that he was no longer associated with it.

The Eastern States Office rejected this contention. It pointed out that there had been no assignment of the record title to Larco and demanded payment of the delinquent royalty.

On appeal, Owen no longer contends that he is not liable for the delinquent royalties, but he asserts that the amount due is $2,459.95, and not $4,304.90. In support he says that leases ES 1261 and 1786 were unitized with other leases to form a 320 ! acre gas unit; that production was attained on ES 1261 while both leases were in their primary terms, that a proper and a timely request was filed to communitize these leases with others in the 320 ! acre gas unit; that the unit should have been approved when it was amended as the Tulsa Geological Survey office had asked. The royalty due, he concludes, should be based on the proportionate acreage of ES 1261 and 1786 to the rest of the unit. As a further argument in support of his contention, he refers to a rule 8 of the State Oil and Gas Board. Rule 8, based upon section 132.21 of the Mississippi Code of 1972, as amended, provides that a gas well drilled and completed to the depth of Well No. 2 shall be located on a drilling unit of not less than 320 acres. The approval of drilling permits on September 2, by the Geological Survey, he

says, resulted in the communitization of leases ES 1261 and 1786 with the other lands in the unit.

If ES 1261 had been in the participating area of a producing unit, the royalties should be computed as Owen contends. If it was not, the royalties due are chargeable to ES 1261.

We agree with the Eastern States Office that royalties on all the gas produced from ES 1261 are chargeable to it.

There is no doubt that the unit agreement was never formally approved. The pertinent regulation authorizes the Secretary to approve communitization agreements, 43 CFR 3105.2-2, and provides that an agreement will become effective only after approval by the Secretary, or his delegate. 43 CFR 3105.2-3; 30 CFR 226.8 (see also 30 CFR 226.12 para. 20, suggested form for unit agreement). The appellant and the others attempted to follow the prescribed procedure by filing a proposed agreement on October 23, 1970, with the Oil and Gas Supervisor. The latter's letter of November 24, 1970, denied approval until the land in ES 1786 was again under lease. There is no contention that the unit was approved thereafter.

Despite the absence of a formal approval, Owen contends that ES 1261 should be considered unitized for two reasons. First, he says it was error to hold ES 1786 to have terminated for failure to pay the annual rental. Rental on ES 1786 was due on or before October 1, 1970. Since it was not a producing lease, it terminated automatically upon the lessee's failure to pay the rental timely. 30 U.S.C. § 188(b). On that date, there was no request for approval of a unit agreement on file. The request, as we have seen, was not filed until October 23, 1970, several weeks after ES 1786 had terminated by law. Therefore, it was not error to hold that ES 1786 terminated.

The appellant then urges that ES 1261 and 1786 were communitized when the Shreveport Office of the U.S. Geological Survey approved its application for a drilling permit on September 2, 1970. We cannot agree. An application for approval of a drilling permit is not the same as a request for approval of a unit agreement. They are approved by different officials, are dissimilar in form and content, and serve different purposes. Approval of the one is not an approval of or a substitute for the other.

Finally, Owen offers as a related argument that Rule 8, with its restriction of one well to 320 acres, made a unit agreement the only way to develop the leases. While we agree that the situation is a typical one justifying the establishment of a unit, we cannot agree t' at the State Board's approval of a drilling permit is

any more a substitute for following the regular procedure and obtaining the necessary approval for a unit agreement than is the District Engineer's approval of a drilling permit.

In brief, appellant failed to take timely the proper steps to have ES 1261 placed in a unit while that lease was in existence. Accordingly, the royalties due on production from it are chargeable to it alone.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the land office is approved.

Martin Ritvo
Member

We concur:

Frederick Fishman
Member

Joan B. Thompson
Member